UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

vs.

Civil Action No. 11-CV-562

MICHAEL BRENNAN, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE OF F. JAMES SENSENBRENNER, JR., ET AL.

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The plaintiffs' opposition brief argues that the Republican House Members ("movants") do not have any right to intervene as defendants in this action, and that the Court should not, in its discretion, permit them to intervene. The arguments fall short on each score. The plaintiffs fail to rebut the movants' showing that their interests are direct, threatened by this litigation, and not adequately represented by existing parties.

I. THE MOVANTS HAVE ASSERTED INTERESTS THAT ARE ADEQUATE AND SPECIFIC TO THEM.

The plaintiffs argue that the movants, despite being incumbent members of the House, have "no less and no more an interest . . . than any other citizen." (Pls.' Br. 3.) The plaintiffs step back from this implausible statement in the rest of their brief, allowing that the "movants' interest . . . , although direct and (to them) uniquely significant, is not legally protectable or capable of being impaired." (*Id.*) The plaintiffs actually argue only that the movants lack an interest of a type they have never claimed — a property right. But Rule 24(a)(2) recognizes and protects many other types of interest, "for the rule does not require that the intervenor prove a property right, whether in the constitutional or any other sense." *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (overturning denial of intervention as of right where promotion exam "created an expectation sufficient to qualify under Rule 24(a)(2)"). Indeed, the plaintiffs themselves have not asserted and could not establish that they have a property interest at stake. Simply, the movants' interests are not only "direct and . . . uniquely significant," but as legally protectable and as at risk of impairment as any can be in redistricting cases.

The movants' interests are just as consequential as they were when the incumbent Republican members of the House (including three of the current movants) successfully intervened as of right in 2002. The plaintiffs try to distinguish that litigation

from this by referring to the existence now and the non-existence then of enacted districting legislation (Pls.' Br. 5, n.2), but that is truly a distinction without a difference. The interests that were sufficient to intervene as of right in 2002 to advocate for a particular judicial plan are sufficient now to defend a valid statutory plan.

II. THE MOVANTS ARE NOT ADEQUATELY REPRESENTED.

As discussed in the movants' first brief and their proposed answer, the existing parties do not adequately represent the movants' interests. The complaint discusses at great length and in some detail its claims regarding the perceived harms of Act 43. (*See* Compl. 13-20, 22-28.) But, as to Act 44, the complaint is paper-thin and comparatively brief. (*Id.* at 20-24, 27-28.) Further, under the rationales of both the plurality opinion of Justice Scalia and the concurring opinion of Justice Kennedy in *Vieth v. Jubelirer*, 541 U.S. 267, 271, 306 (2004), no judicially manageable standards could exist for any claim asserted as to Act 44 (a position that the movants are eager to demonstrate). Yet, in the five months since this litigation began, no serious attention has been focused on these weak Act 44 claims. The parties have, rather, devoted their attention (and the Court's) almost entirely to Act 43 issues.

Nor does the involvement of the Attorney General in representing the defendants "foreclose" the motion to intervene, as the plaintiffs suggest. (Pls.' Br. 3.) At most, this may create a presumption of adequacy if identical interests are at stake. *Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (finding that intervenors met "minimal burden" of showing inadequacy where the "public interest the government is obligated to represent may differ from the would-be intervenor's particular interest"). The movants have met their burden of rebutting any possible presumption.

The plaintiffs' brief attempts to paint the movants' assertion on this point as stemming solely from the Court's denial of the motion to dismiss, a mundane "adverse result," in the plaintiffs' words. (Pls.' Br. 3.) The movants' first brief did not rest on the bare result of the Court's order of October 21, but on the content and focus of the briefing in advance of that decision, and the resulting focus of the decision's discussion itself. To repeat, the movants state:

> The existing pleadings, as well as the briefing on the motions to dismiss, strongly suggest that the focus and passions of the existing parties are directed mostly at the redistricting of Assembly and Senate districts, with substantially less attention being given to the comparatively simple claims based upon the Congressional redistricting legislation.

(Br. in Supp. of Mot. to Intervene 8.) The movants are, naturally, especially well-positioned to notice this deficiency and act upon it. Given the expedited nature of this litigation, they do not have time to wait and see whether the existing parties will act in greater accord with the movants' interests in the future, nor to wait to see whether the defendants will at some point "throw the case," as the plaintiffs seem to suggest they should. (Pls.' Br. 4.) To be clear, the movants have never suggested that the defense will be "thrown," but that is hardly the test of adequacy of existing representation. The interests of the defendants and the movants are not identical, the representation of movants' interests has been neither vigorous nor effective, and time is short.

III. NO FLOOD OF EQUALLY WORTHY LITIGANTS EXISTS; THUS, ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.

Besides having the right to intervene for the explained reasons, the movants should, alternatively, be permitted to intervene under Rule 24(b). Not only do the

movants meet the comparatively simple requirements of that provision, but their involvement will serve to sharpen the Act 44 issues before the Court, permitting a timely resolution, as required both by their interests and the election calendar.

The heart of the plaintiffs' argument seems to be their fear of an endless stream of other intervenors. (Pls.' Br. 1 (stating the "motion no doubt is the first in what may well be a long line of intervention motions").) This is not much of an argument, certainly not where the only proposed intervenors to date are these moving Republican House Members themselves – and the remaining three Wisconsin members of the House who filed their intervention motion on November 17. The argument, further, fails to give either the Court or the movants much credit for good sense.

Significantly, the possibility of additional intervention motions — whether or not meritorious — is not a criterion to be considered in assessing entitlement to intervene under either subsection of Rule 24. Rather, the right way to deal with "too many" parties in a case is by using the Court's ample Rule 16 powers to manage the case, particularly the broad authority granted under Rule 16(c)(2)(L)-(P). There is, indeed, no reason why the present movants would not work with the existing parties to achieve agreement on such measures, without the need for the Court even to invoke those powers. The current movants have every bit as much incentive as existing parties to stipulate to matters that need not be proved, to avoid duplication among the defendants with respect to arguing legal points, and so forth.

The plaintiffs portray the pool of potential intervenors as virtually limitless. Putting aside the fact that such as-yet-unidentified would-be intervenors would likely not have a sufficiently direct interest to qualify them to intervene of right, as the

movants here do, it is a particular stretch to advance the argument that the plaintiffs make in the context of discussing permissive intervention.

Likewise, it is very odd that the plaintiffs, whose "interest" in this case arises only from their status as voters who have designated themselves to bring this challenge, would object to the involvement of officeholders who have established the seriousness of their interest in the subject matter by offering themselves for election, in many cases repeatedly, and who intend to do so again next year. The movants do not have and have never claimed a property interest in continuing in their offices, but they have a real and substantial interest in upholding the current law, which allows them and any who might choose to contest the seats in the House with them to begin to put together campaigns for election, free of the uncertainty that the plaintiffs' challenge has created.

Beyond showing that the movants' position surely shares common questions of law and fact with existing defenses of Act 44 for Rule 24(b) purposes, the movants' proven electoral histories, and their commitment of resources here, evince a special interest in resolving the plaintiffs' challenge efficiently. That is, the continued pendency of this litigation – much of the complication of which comes from the challenge to the separate Act 43 – is directly contrary to the movants' interest in resolving Act 44 issues with dispatch. Their ability to defend their particular interests will surely help, rather than hinder, this Court in executing its duties.

Dated this 18th day of November, 2011.

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